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Via Fax to (775) 684-5951

Nevada Division of Public and Behavioral Health
ATTN: Medical Marijuana Division
4150 Technology Way, Suite 104
Carson City, NV 89706
Attn: Mr. Joseph Thiele, Management Analyst II

RE: ***Public Comment Regarding the Division of Public and Behavioral Health's Proposed Amendments of Chapter 453A of the NAC.***

Dear Mr. Thiele,

Thank you for the opportunity to provide public comment on the proposed amendments and other modifications of Chapter 453A of the NAC.

Here are a few of our law firm's public comment/recommendations and the reasoning for our comments and recommendations:

1. **Recommendation:** The Division should immediately provide a scoring rubric (similar to the one it had included in the prior version of the draft regulations) for all of the criteria used for scoring and ranking. Such a rubric will shape the applications and the establishments themselves to the form most desired by the Division.

   Applicants need and deserve to be told what the scoring rubric is for any and all stages of the application evaluation process. This would also serve public policy purposes and allow applicants to best present the Division with what it wants.

   In particular, applicants need and deserve to be told the proposed scoring rubric for Sec. 27(1) and (2) criteria as soon as possible to be able to provide public comment on the proposed scoring rubric prior to its adoption.

A few examples of the questions raised in the absence of a scoring rubric:

- How many points does an applicant get for owning the proposed site as opposed to merely being authorized to use the proposed the site for a medical marijuana establishment?

- Does an applicant get a greater number of points for having a higher dollar amount of liquid assets?

- Does an applicant get a greater number of points if he has paid a higher amount of taxes in Nevada?

- How are the points to be awarded as to the proposed organizational structure? Is every item listed in subsections 5 and 6 of section 26 weighted equally? If not, then what is the weighting for each of those many items?

2. **Recommendation:** All of the criteria of merit should be part of the second stage of the application process and should be scored with a rubric that is available in advance to the public. (*See Recommendation 1.*)

The "criteria of merit" of vertical integration/"seed to sale" still is not included in the scoring and ranking criteria of the second stage despite being one of the criteria of merit written into the law itself. Instead of codifying vertical integration/"seed to sale" as something that an applicant would get additional points for in the in the second stage, the Division has included it in the first stage of the application process, which seems odd because the first stage is not a ranking or scoring but rather a list of information that the application must contain to be compliant and complete. The first stage appears to be more of a checklist.

"Criteria of merit" by their very definition and nature should be criteria that an applicant can get a range of credit for – the more of a criterion of merit an application has, the more credit it should get for that criterion of merit. "Criteria of merit" do not belong on a checklist.

Again, if the Division gives greater credit for the criteria deemed most desirable and most beneficial to the public, then it is likely to see applicants striving toward maximizing those particular criteria.

Likewise, the Division also is "considering" another one of the law's criteria of merit in the first stage of the application process instead of making it something an applicant would get additional points for in the in the second stage. In the first stage of the application process the Division will also take into account documentation concerning the adequacy of the size of the proposed MME to serve the needs of cardholder patients including, without limitation, building and construction plans with supporting details.

3. **Recommendation:** Immediately publicize the Division's proposed formula for determining the number of cultivation facility registration certificates and the Division's proposed number(s) of cultivation facility registration certificates developed from that formula and call for public comment on the formula and the proposed number(s).

   During the prior public hearings in October, the Ms. McDade-Williams said the Division was working on a formula to be used to determine the number of cultivation facility registration certificates that will be available. Ms. McDade-Williams also said the Division expected that it would need to issue the cultivation facility registration certificates first because the supply for the dispensaries must be created as the first step in this new industry's supply chain.

   Applicants need and deserve to know what that formula is and what number of cultivation facility registration certificates the division has determined will be necessary. Indeed, that information needs to be publicized as soon as possible so that public comment can be provided on both the formula and the proposed number of registration certificates.

4. **Recommendation:** Upon request, the Division should provide to the requestor the number of cardholders in each census tract within the county, unless there is only one person living in the census tract and that one person is a cardholder. (That highly unusual situation would be the only instance in which the release of the information would, in fact, be a release of "identifying information" thereby violating NRS 453A.700.)

   The Division should provide to prospective applicants for dispensary and cultivation registration certificates more information as to where in the counties of Clark and Washoe the numbers of medical marijuana cardholders reside.

   We recommend providing, upon request from a prospective applicant, the number of cardholders in each census tract within the county, unless there is only one person living in the census tract and that one person is a cardholder. (That highly unusual

situation would be the only instance in which the release of the information would, in fact, be a release of "identifying information" thereby violating NRS 453A.700.)

There are numerous reasons why the Division should provide this information.
First, the draft regulation of NAC Chapter 453 Sec. 26(7) (which is taken from NRS 453A.328(7)) states that applicant for a registration certificate must include "documentation concerning the adequacy of the size of the proposed medical marijuana establishment to serve the needs of persons who are authorized to engage in the medical use of marijuana."

For a dispensary, location is inherent in that requirement because the size of a dispensary would be tied to the supply necessary for the demand in that location, and the demand in any particular location is very likely to be tied to the proximity of medical marijuana users to that dispensary.

NRS 453A.328(5) further states that one of the criteria of merit that the Division must consider in determining whether to issue a registration certificate is "[w]hether the proposed location of the proposed medical marijuana establishment would be convenient to serve the needs of persons who are authorized to engage in the medical use of marijuana."

Providing the recommended information also serves public policy in several ways. Providing additional geographic information aimed at having dispensaries and cultivation facilities located as close as possible to the largest numbers of patients would serve the Division's goal of trying to reduce the inconveniences and burdens that the delivery system is placing upon patients. Additionally, reducing the amount travel time and distance from a dispensary to a patient's home would serve law enforcement concerns and concerns about the potential for. Certainly, law enforcement, if not regulators as well, would agree that the less time and distance that marijuana is being driven along the valley's roads the better.

If the Division has not already compiled this information, it is reasonable to presume that it is going to have to compile it because the Division will need to analyze the information to properly assess applications for Medical Marijuana Establishment Registration Certificates in light of the aforementioned NAC Chapter 453A Sec. 26(7), NRS 453A.328(7), and NRS 453A.328(5). To properly assess the applications, the Division will have to consider the proposed location of the applicant establishment in light of the number of medical marijuana cardholders who live in proximity to the proposed location of the applicant establishment.

The Division will likely claim that NRS 453A.700 prevents the Division from providing anything more than the limited information presented in the form of monthly reports on the web site - but such a claim would be incorrect. The statute only prohibits disclosure of "identifying information." Releasing the number of cardholders in a census tract would not identify the cardholders unless there was only one person living in that particular census tract and that one resident was also the sole cardholder. The number of cardholders in a Census tract is merely a smaller scale version of information that the Division already publicizes on the monthly reports.

5. **Recommendation:** Upon request, the Division should provide to the requestor the number of medical marijuana cardholders in every county of Nevada, not just the numbers for Washoe and Clark.

   In light of the fact that good public policy supports the general idea of having dispensaries in all the counties to properly serve Nevada residents, the Division should provide, upon request to applicants, the number of patient cardholders in each of the counties other than Clark and Washoe.

   While the monthly reports do break out Clark and Washoe patient numbers, they do not break out the patient numbers for each of the other counties. Instead, they lump all of the other counties into "balance of state." How many patients are in each of those other counties is one of the first pieces of information an applicant considering applying for a registration certificate in any of the rural counties would want/need to know.

   Again, releasing those numbers would not constitute a release of "identifying information" and therefore would not be a violation of NRS 453A.700. Indeed, it stands to reason that the medical marijuana patients in a rural county would favor the release of such information because it would be a release that would likely spur application for a registration certificate for a dispensary that would in turn serve those medical marijuana patients.

   And if there are any Nevada counties in which there are no medical marijuana cardholders, then Division should make public that information, at the very least, so that applicants do not waste their time and the Division's time applying for a dispensary registration certificate in such a county.

6. **Recommendation:** The Division should allow outdoor cultivation facilities.

During the October 2013 public workshops, numerous people provided public comment extolling the virtues and benefits of outdoor cultivation facilities. But we are not seeing any

revisions in the most recent draft regulations that specifically acknowledge the possibility of outdoor cultivation facilities. Thankfully, there do not appear to be any additions that specifically prohibit outdoor grows either. Everything continues to continue to be tied to the "enclosed, locked facility" definition in the medical marijuana law itself, which is: "a closet, display case, room, greenhouse or other enclosed area that meets the requirements of NRS 453A.362 and is equipped with locks or other security devices which allow access only by a medical marijuana establishment agent and the holder of a valid registry identification card." (Emphasis added). NRS 453A.362, the statute to which the definition of "enclosed, locked facility" refers, mandates that "at each medical marijuana establishment, medical marijuana must be stored only in an enclosed, locked facility." So it would appear that an applicant may yet be able to have an outdoor cultivation facility so long as the applicant can satisfy get the requirements that it be "enclosed" and "locked."

Merriam Webster defines "enclose" as meaning "to close in, to surround, to fence off for individual use."

Neither the draft regulations nor, arguably more importantly, the statute defines "enclosed" to mean anything more than the plain language definition. Under that plain language definition, an outdoor cultivation facility could qualify as an "enclosed" facility. However, the Division needs to clarify that this is, in fact, the case.

If you need any clarification or additional information about any of these recommendations, please do not hesistate to e-mail me at Patrick@raineydevine.com.

Thank you for your hard work on behalf of taxpayers and the public.

Sincerely,

RAINEY DEVINE, ATTORNEYS AT LAW

Patrick C. McDonnell, Esq.
Associate